

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**DEREK HUNT**

Claimant

VS.

**TOM OWENS PLUMBING, INC.**

Respondent

AND

**AMERICAN FAMILY MUT. INS. CO.**

Insurance Carrier

Docket No. 1,051,770

**ORDER**

**STATEMENT OF THE CASE**

Respondent and its insurance carrier (respondent) requested review of the December 14, 2011, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 21, 2012. Roger D. Fincher, of Topeka, Kansas, appeared for claimant. Daniel N. Allmayer, of Kansas City, Missouri, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant had a 15 percent impairment to the body as a whole as a result of the injury to his neck, as well as a 6 percent impairment to the body as a whole for residuals of radiculopathy, which combine to give claimant a total 20 percent impairment to the body as a whole. The ALJ further found that claimant had a 20 percent wage loss and a 39 percent task loss for a work disability of 29.5 percent.

The Board has considered the record and adopted the stipulations listed in the Award.<sup>1</sup> The Board has also considered the evidentiary deposition of Thomas Owens taken October 21, 2010.

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<sup>1</sup> In the itemization of the record on page 1 of the ALJ's Award, the Regular Hearing is listed as having been held on October 21, 2010. The transcript of the Regular Hearing and the Division's record show the Regular Hearing was held on July 28, 2011.

### ISSUES

Respondent argues that the ALJ miscalculated the claimant's post-accident average weekly wage. Respondent contends that claimant is not entitled to a work disability because he has failed to prove a wage loss of 10 percent or more. In the event the Board finds claimant is entitled to a work disability, respondent argues that claimant's task loss should be calculated as 26 percent, the average of the two doctors who found a 39 percent task loss and 0 percent from Dr. Pat Do, who found claimant need not have any permanent restrictions. Respondent also asks the Board to adopt Dr. Do's functional impairment rating of 15 percent to the body as a whole.

Claimant asks the Board to adopt the ALJ's findings regarding his functional impairment. Further, the claimant contends he is eligible for an award of work disability of 30 percent based on a 21 percent wage loss and a 39 percent task loss.

The issues for the Board's review are:

- (1) What is the nature and extent of claimant's functional disability?
- (2) What is claimant's post-injury average weekly wage? Was claimant's wage loss sufficient to trigger eligibility for a work disability?
- (3) What is claimant's task loss?

### FINDINGS OF FACT

Claimant testified that on May 27, 2008, a few months before he started working for respondent, he had gone to the emergency room with injuries from an incident in April 2008 when he had been wrestling with a friend. He told hospital personnel he had heard a pop and had immediate pain in his left neck into his left shoulder. He said x-rays were taken at the hospital, and he was told he probably just pulled a muscle. He did not receive any follow up treatment. He said he took a couple of days off work and his shoulder problem resolved. On cross-examination he acknowledged he had seen a chiropractor several times in June 2008 because he had hurt his lower and middle back and his shoulder. He admitted he may have complained to the chiropractor about left trapezius and arm pain with problems in the neck muscles and numbness in his left arm.

Claimant began working for respondent on August 13, 2008, as an apprentice plumber. He described his job as hard and physical. He said he did a lot of hand digging, shoveling gravel from a truck into a wheelbarrow, and laying gravel for pipe bedding. When claimant went to work for respondent, he was able to perform all the job duties required of him. Before the work-related accident, he had never complained to Thomas Owens, respondent's owner, or anyone at respondent about having problems with his neck or left shoulder.

Claimant testified that on September 23, 2008, he had to go down into an excavation hole to hook up a pipe. The hole was about 2 1/2 feet wide and 9 feet deep. When he was trying to go down into the hole, the dirt on the right side crumbled away and caused him to slip, and his body fell straight down into the hole with his feet hitting the ground. His left arm shot up along the side of the wall and his left hand was above his head. After the fall, claimant experienced pain in his left shoulder up into his neck. Mr. Owens was present, and claimant told Mr. Owens that his shoulder was hurt.

After the accident, respondent sent claimant to the emergency room, where he was seen by Dr. Donald Mead. Thereafter, his treatment was taken over by Dr. Michael McCoy, who sent him to physical therapy, as well as to Dr. Florin Nicolae for injections in his neck. In January 2009, claimant was referred to Dr. Michael Smith. Claimant said immediately after the accident, his pain was worse in his shoulder than his neck. After physical therapy, his shoulder got worse instead of better, and the pain radiated to the left side into his neck to the bottom of his head. He felt numbness and tingling going down into his arms every day.

Claimant still has problems in his neck and left shoulder every day. When he bends down, he gets a pain from his neck down to the little finger and thumb. He described the pain as a numbness and tingling. His thumb constantly tingles. He gets sharp pains on the back edge of his left shoulder. Claimant said there is a difference between the pain in his neck and shoulder compared to the pain he had earlier in 2008 when he went to the emergency room after the wrestling incident. The pain before was like he had pulled a muscle. His current pain is deep inside his shoulder and deep inside his neck.

Mr. Owens testified that before September 23, 2008, claimant was able to perform all the job duties he asked of him. He did not recall that claimant had any complaints about his neck or left shoulder before September 23, 2008, nor had claimant ever said he could not do his job because his neck or shoulder hurt.

Mr. Owens was present at the site at the time of claimant's accident. He said the trench was 7 to 8 feet deep. He saw claimant sliding down the end wall of the trench and saw claimant's arm come up as he went down. Claimant's arm was rubbing against the side wall of the trench. Mr. Owens said that when claimant came out of the trench, he mentioned that something felt different in his shoulder, but Mr. Owens did not notice that claimant acted as if he was in excruciating pain. Claimant did not ask to see a doctor nor did Mr. Owens ask claimant if he needed to see a doctor. Claimant continued to perform his job duties on September 23, 2008. Several days after the incident in the trench, claimant told Mr. Owens he was still having problems, and he was told to go to the emergency room.

Mr. Owens said claimant was off work for a period of time and returned to work on January 19, 2009, without too many restrictions. Mr. Owens was told that claimant testified he was laid off in January 2009 and terminated in March, and Mr. Owens said that

sounded about right. Claimant, however, did not say he had been laid off in 2009. He testified he could not remember the year he was laid off and terminated. Respondent's payroll records show claimant was still an employee through December 31, 2009. None of respondent's 2010 payroll records were made a part of the record. Mr. Owens also stated that claimant was drawing unemployment benefits, but there is no evidence in the file of when those benefits started or how many weeks claimant received unemployment benefits.

Claimant began working for Home Depot on August 9, 2010. He testified his starting wage at Home Depot was \$11.25 per hour and that at times he worked some overtime. Payroll records from Home Depot entered as an exhibit to the Regular Hearing show that on or about February 7, 2011, his wage was raised to \$12 per hour. At the Regular Hearing held July 28, 2011, claimant testified that he had just received a raise and his pay at that time was \$12.75 per hour. The Home Depot records also indicate that claimant intermittently worked overtime and beginning on or about November 6, 2010, began receiving fringe benefits. The payroll records encompass a 46-week period from August 9, 2010, through June 26, 2011. During that period, claimant earned \$19,164.82 in regular wages, an average of \$416.63 per week; \$1,222.32 in overtime wages, an average of \$26.57 per week; and additional earnings of \$1,667.50, an average of \$36.25 per week.<sup>2</sup> Adding claimant's average regular and overtime wages and the average of his additional earnings computes to a post-injury average weekly wage of \$479.45.<sup>3</sup>

Dr. Michael Smith is an orthopedic surgeon who began treating claimant on January 6, 2009. Dr. Smith took a history from claimant and reviewed x-rays of claimant's cervical spine taken November 26, 2008, which showed some degeneration at the C5-6 level, and a report of an MRI done December 3, 2008, that showed a left lateral disc herniation at the C5-6 level. Dr. Smith also indicated he reviewed a "plain x-ray dated May 27, 2008, which showed only the mild degenerative changes, which are also present on the films from November of 2008."<sup>4</sup> Claimant complained of pain, numbness and weakness in his left upper extremity and neck. Claimant said he had been injured in an accident when he entered a trench, dirt gave way, and he hyperextended his left arm.

Dr. Smith sent claimant to have an epidural steroid injection. When claimant returned in February 2009, he had undergone two injections. Dr. Smith said they talked about further conservative measures, but claimant wanted surgery. Dr. Smith performed an anterior cervical discectomy and fusion at C5-C6 on March 30, 2009. He last saw claimant on April 7, 2009, at which time he released claimant to light duty work and then back to regular duty. Claimant was supposed to return to see Dr. Smith on May 19 but he

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<sup>2</sup> Additional earnings consisted of sick pay, holiday pay, hlthasmtcr and dc s share.

<sup>3</sup> There was no testimony concerning the value of claimant's post-accident fringe benefits.

<sup>4</sup> Smith Depo., Ex. 1 at 39.

did not appear for that appointment and has not returned since. Dr. Smith did not do a task loss analysis, nor did he give claimant a permanent impairment rating.

Dr. Smith testified that claimant gave him a history of symptoms in his neck and left shoulder going back to June 2008. Dr. Smith said that on January 6, 2009, it seemed to him that claimant's complaints were not secondary to a work injury. Dr. Smith had no medical reports concerning claimant that went back to June 2008. He acknowledged there could be documentation and reports that would make him change his causation opinion.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on September 10, 2010, at the request of claimant's attorney. Claimant gave Dr. Prostic a history of climbing into an excavation ditch when the side gave way and he had a forceful abduction of his left shoulder. Dr. Prostic reviewed claimant's medical records from the emergency room, Dr. McCoy and Dr. Smith. Claimant told Dr. Prostic he had pain from his left neck down toward his left thumb. He has constant numbness of the thumb. He has trouble turning his head to the left and has increased pain with pushing, pulling, reaching and lifting. He has intermittent muscle spasms. He is sensitive to inclement weather.

Claimant told Dr. Prostic that he had previously suffered an ache about his left shoulder for which he was seen at an emergency room but had no follow up care. Claimant said he had several previous chiropractic treatments for his left shoulder. However he had neither lost time from work nor had been unable to perform activities at home or work before the September 2008 accident.

Dr. Prostic stated that claimant suffered injury to his cervical spine for which he required a discectomy and fusion at C5-C6. He also found evidence of median nerve entrapment at the wrist, ulnar nerve entrapment probably at the elbow, and rotator cuff irritability. After examining claimant, Dr. Prostic opined that claimant sustained a work related injury on September 23, 2008, and that he had a good response to his anterior cervical discectomy and fusion but continued to have problems with rotator cuff dysfunction and median and ulnar nerve entrapment. Based on the *AMA Guides*,<sup>5</sup> Dr. Prostic rated claimant as having a 15 percent permanent partial impairment of the body as a whole for his cervical spine and a 20 percent impairment of the left upper extremity.<sup>6</sup>

Dr. Prostic did not give claimant any permanent restrictions at the time he evaluated him. But he believed claimant needs to be at medium level employment with avoidance of use of his left hand above his shoulder and avoidance of repetitious forceful gripping left-

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<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>6</sup> The 20 percent left upper extremity impairment converts to 12 percent to the body as a whole. Using the *AMA Guides* Combined Values Chart, Dr. Prostic's ratings combine to a 25 percent impairment to the body as a whole.

handed. He reviewed the task list prepared by Dick Santner<sup>7</sup> and indicated that claimant would be unable to perform 11 tasks out of the 28 tasks on the list, for a 39 percent task loss.

Dr. Prostin believes claimant should have an EMG, and if it shows peripheral nerve entrapment, he should have decompressive surgery. Dr. Prostin also recommended that claimant have physical therapy for his shoulder.

Dr. Prostin said that claimant may have had preexisting disease in his neck and left shoulder, but claimant told him he had no impairment at those areas prior to the work related accident and that he had recovered from the preexisting problems and was able to do everything prior to his accident. Dr. Prostin acknowledged that he had no medical records detailing any preexisting condition and all his conclusions about the preexisting conditions were based upon his interview with claimant.

Claimant was evaluated by Dr. Peter Bieri on April 12, 2011, at the order of the ALJ. Claimant reported he was injured on September 23, 2008, when he slipped and fell in a ditch and sustained an abduction injury to his left shoulder. Claimant told Dr. Bieri the pain radiated to the elbow. Dr. Bieri reviewed the medical records of Drs. McCoy and Smith and the medical report of Dr. Prostin.

When listing claimant's past history in his report, Dr. Bieri set out an injury to the lumbar spine in 2003, a minor injury to the left clavicle in 2002, and a soft-tissue injury to the left wrist in 2002. Dr. Bieri noted, "The claimant specifically denied any other pre-existing illness or injury involving the neck or left shoulder."<sup>8</sup>

Claimant told Dr. Bieri he continued to have neck pain but it had improved somewhat by surgery. Claimant reported he had pain that radiated into the entirety of the left upper extremity. He complained of persistent numbness of the left thumb, decreased sensation of the left fourth and fifth digits, and weakness with repetitive gripping and grasping. Claimant said he had occasional discomfort with left shoulder-level and overhead use.

Dr. Bieri opined that claimant incurred injury to the left shoulder on September 23, 2008, with an initial diagnosis consistent with rotator cuff tendinitis. Claimant was subsequently diagnosed with disc herniation at C5-C6 with left upper extremity radiculopathy. Dr. Bieri stated that the diagnoses and subsequent treatment appeared reasonable, appropriate and consistent.

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<sup>7</sup> Dick Santner, a vocational rehabilitation counselor, interviewed claimant on August 25, 2010, at the request of claimant's attorney. He compiled a list of 28 tasks that claimant performed in the 15-year period before his work-related accident.

<sup>8</sup> IME report of Dr. Peter Bieri dated April 12, 2011, (filed April 27, 2011) at 3.

Dr. Bieri found claimant to be at maximum medical improvement. Based on the *AMA Guides*, he rated claimant as having a 15 percent whole person impairment for DRE Cervicothoracic Category III, as well as a 10 percent left upper extremity impairment for residuals of radiculopathy, which translates into a 6 percent whole person impairment. Claimant's total combined whole person impairment would be 20 percent, which Dr. Bieri found attributable to the work-related injury.

Dr. Bieri found:

The claimant fails to meet the criteria for a specific permanent impairment of the shoulder directly attributable to the injury in question. Based on the history and documentation, there appears to be no significant pre-existing impairment of the left shoulder or left upper extremity.<sup>9</sup>

Dr. Bieri reviewed the task list compiled by Dick Santner. Of the 28 tasks on the list, he opined that claimant is unable to perform 11 for a 39 percent task loss.

Dr. Pat Do evaluated claimant on August 22, 2011, at the request of the ALJ. Dr. Do stated that claimant was "vehement" in stating he sustained an injury on September 23, 2008, when working for respondent. Claimant told Dr. Do he began working for respondent in August 2008, at which time he was having no neck or shoulder pain. He stated in September 2008 he fell in an 8 to 9 feet excavation, landing on both feet and injuring his neck and left shoulder. Claimant told Dr. Do he had a traction-type injury to his neck in April 2008 and went to the emergency room on May 27, 2008. Dr. Do indicated the May 27, 2008, medical records show claimant complained of neck pain and left shoulder pain.

After examining claimant and reviewing his medical records, Dr. Do believed that claimant suffered a C5-C6 disc herniation and underwent an anterior cervical discectomy and fusion, leaving residual numbness in claimant's thumb and index finger. Dr. Do agreed with Dr. Smith that the numbness is a residual of claimant's injury. After examination of claimant's left shoulder, Dr. Do indicated he probably has a labral tear and impingement and possibly some rotator cuff pathology. Dr. Do found no findings of peripheral nerve entrapment as noted in Dr. Prostin's report.

Dr. Do opined that claimant's injury in September 2008 was to his neck with residual numbness and tingling to his thumb and index finger. He did not believe that claimant's left shoulder complaints were related to the September 2008 injury. He believed the left shoulder complaints were due to claimant's athletics and his traction-type injury in April 2008. Although Dr. Do noted that claimant still had left shoulder pain, he did not believe it was due to the September 2008 injury.

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<sup>9</sup> IME report of Dr. Bieri, April 12, 2011 (filed April 27, 2011) at 6.

Based on the *AMA Guides*, Dr. Do rated claimant as being in DRE Cervicothoracic Category III, a 15 percent whole person impairment. Dr. Do noted Dr. Bieri rated claimant's numbness and tingling separately, but Dr. Do's 15 percent rating encompassed claimant's residual numbness and tingling.

Dr. Do said claimant indicated he did not feel like he needed any kind of permanent work restrictions, and Dr. Do agreed. So, Dr. Do did not place any permanent restrictions on claimant. Dr. Do did not review a task list and did not testify concerning claimant's task loss. Dr. Do did not think claimant would need any future medical.

### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>10</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>11</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

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<sup>10</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>11</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).



the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>12</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>13</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>14</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>15</sup>

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

### ANALYSIS

Claimant suffered personal injury to his neck and left upper extremity in the accident that occurred at work on September 23, 2008. Claimant had no preexisting impairment of function, restrictions or limitations. As a direct consequence of the accident at work and

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<sup>12</sup> *Id.* at 278.

<sup>13</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>14</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>15</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

resulting injuries, claimant now has a 15 percent permanent impairment of function to his neck and a 10 percent permanent impairment to his left upper extremity at the shoulder. These rating combine to a 20 percent impairment to the body as a whole.

Claimant's permanent partial disability on a functional basis is 20 percent. Although the evidence is incomplete, the record shows that claimant continued to be employed by respondent and earned wages through all of 2009. The record fails to prove when claimant terminated his employment with respondent. Claimant was unemployed for some period of time beginning in 2010, during which time claimant had an actual wage loss of 100 percent, which would qualify him for a work disability. But those dates cannot be determined. As such, claimant's permanent partial disability is limited to his percentage of functional impairment until he returned to work with a subsequent employer at a lower hourly wage.

Beginning August 9, 2010, claimant went to work at Home Depot and initially was paid an hourly wage of \$11.25. Thereafter, on February 7, 2011, his post-injury hourly wage increased to \$12. Finally, by the time of the regular hearing, claimant's hourly rate had increased to \$12.75. The best evidence of claimant's actual post accident earnings is claimant's Exhibit 1. It shows claimant earned a total of \$22,054.64 over a period of 46 weeks at Home Depot for an average weekly wage of \$479.45. This results in an actual wage loss of 20 percent.

Averaging claimant's 39 percent task loss with his 20 percent wage loss results in a permanent partial disability of 29.5 percent.<sup>16</sup>

### CONCLUSION

(1) Claimant's permanent impairment of function attributable to the work-related accident is 20 percent.

(2) Claimant has proven a wage loss in excess of 10 percent beginning August 9, 2010, and is therefore entitled to an award of permanent partial disability based on work disability.

(3) Claimant's task loss is 39 percent. His wage loss is 20 percent. His work disability is 29.5 percent.

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<sup>16</sup> Even though the percentages of work disability changed when claimant's wage changed, it makes no difference in the amount of the permanent partial disability award. Therefore, the Board will use the final percentage of wage loss in calculating the award.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated December 14, 2011, is modified as to the method of determining a wage loss of 20 percent and a work disability beginning August 9, 2010, but is otherwise affirmed in all respects.

Claimant is entitled to 9 weeks of temporary total disability compensation at the rate of \$401.43<sup>17</sup> per week or \$3,612.87, followed by 83 weeks of permanent partial disability compensation at the rate of \$401.43 per week or \$33,318.69 for a 20 percent functional disability, followed by 39.43 weeks of permanent partial disability compensation at the rate of \$401.43 per week or \$15,828.38 for a 29.50 percent work disability, making a total award of \$52,759.94.

As of March 20, 2012, there would be due and owing to the claimant 9 weeks of temporary total disability compensation at the rate of \$401.43 per week in the sum of \$3,612.87, plus 122.43 weeks of permanent partial disability compensation at the rate of \$401.43 per week in the sum of \$49,147.07, for a total due and owing of \$52,759.94, which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Daniel N. Allmayer, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge

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<sup>17</sup> In computing the Award, the ALJ used a compensation rate of \$401.42. The Board computes claimant's compensation rate to be \$401.43.